No. 88-1726

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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STEVEN DOE & MARGARET DOE, *et al.*,
*Petitioners,*

vs.

HENNEPIN COUNTY, *et al.*,
*Respondents.*

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

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## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

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### ARGUMENT

Respondents' Brief in Opposition sensationalizes the facts of this case, while it minimizes the significant legal issues raised by the petition. However, their attempt to trivialize this case does not hold up under scrutiny.

### I. RESPONDENTS' ACTIONS WERE NOT OBJECTIVELY REASONABLE, AND THE EIGHTH CIRCUIT ERRED IN HOLDING THAT RESPONDENTS WERE ENTITLED TO QUALIFIED IMMUNITY ON THE BASIS OF A LACK OF EVIDENCE OF MALICE OR WRONGFUL MOTIVES.

Respondents argue that in this case, "The Eighth Circuit's comments regarding the existence of malice

are dicta." Resp. Br. at 8. However, it is clear that in this case, citing *Meyers v. Morris*, 810 F.2d 1437 (8th Cir. 1987) *cert. denied* 108 S. Ct. 97 (1987), the Eighth Circuit held that government social workers enjoy qualified immunity whenever their actions are not subjectively malicious. Pet. at 17; App. 11. The holding is an actual and an aberrant doctrine. Pet. at 17-18.

The determination by the Eighth Circuit in this case that respondents' actions were "objectively reasonable" was reached under an erroneous view of the application of the law of due process. Pet. at 10-16. If the proper objective reasonableness test of *Anderson v. Creighton*, 107 S. Ct. 3034 (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) were employed in this case, the government social workers would not be entitled to qualified immunity. Pet. at 18-20.

Respondents say, "The 8th Circuit in *Meyers* established that governmental officials are entitled to qualified immunity where they 'have at least arguable probable cause to believe that adults are molesting children.' " Resp. Br. at 7. However, even under their view of *Meyers* and the decision of the Eighth Circuit in this case, the question remains: for what actions may governmental officials be qualifiedly immune? While social workers with "arguable probable cause" may be immune for invoking legal procedures which pass constitutional muster, they would not enjoy qualified immunity, if they shot the father because they believed he had molested one of his daughters. Under a correct view of the law in this case, the wrongful actions[1] of the defendants violated due process prin-

[1] These actions not only were taken with deliberate indiffer-

ciples that were clearly established at the time. Pet. at 19-20.

## II. A PRE-DEPRIVATION HEARING IN THIS CASE WOULD HAVE PROMOTED THE BEST INTERESTS OF THE CHILDREN AND WOULD HAVE BEEN AS FEASIBLE AND AS APPROPRIATE AS IN *GOSS v. LOPEZ* AND *CLEVELAND BOARD OF EDUCATION v. LOUDERMILL*.

Respondents say, "where children are at risk from sexual abuse, removal from the home first, followed by a hearing on the need to remove them is a constitutionally adequate procedure." Resp. Br. at 5. That may be correct in an emergency situation, and Minnesota law (as well as state law generally) reflects that reality. However, "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." *Bell v. Burson*, 402 U.S. 535, 540 (1971). In a non-emergency, the Due Process Clause requires a pre-deprivation hearing. *Id.* at 542; *see also* Pet. at 21-25.

Respondents argue that *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) and *Goss v. Lopez*, 419 U.S. 565 (1975) are inapposite, because in those cases "there is usually time enough for a pre-deprivation hearing." Resp. Br. at 7. However, in the employment context, as in *Loudermill*, and in the context of a suspension from school, as in *Lopez*, there also might be emergencies in which a waiver

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ence to or reckless disregard for the best interests of the child standard. They also included falsification of allegations in the petition and the courtroom testimony presented to the juvenile court. Therefore, respondents' contention that petitioners "received a constitutionally adequate hearing," Resp. Br. at 6, is not true.

of the pre-deprivation hearing would be constitutionally permissible. The Court should grant certiorari in this case to decide whether the emergency/non-emergency distinction should be drawn in applying the Due Process Clause to the facts of this case.

Furthermore, a determination of what process is due and when under the facts of this case will quiet a nation-wide controversy over the question of when a social worker may act to deprive a family of its protected liberty interest in unity without first contacting the family members, particularly the parents. Removal of children from the family without first contacting the parents and otherwise reasonably investigating the facts is commonplace in America. *See* the comments of law professor Douglas Besharov (first Director of the National Center for Child Abuse and Neglect and currently Resident Scholar at the American Enterprise Institute, Washington, D.C.) in St. Paul Pioneer Press, Nov. 15, 1985, at D1, col. 2; *see also* Besharov, *Overreach of the Guardian State*, Wall St. J., Apr. 2, 1984, at 30, col. 3. The well-being of children and families will be served if the Court accepts this issue for resolution.

## III. PETITIONERS NEVER CONCEDED AND DO NOT CONCEDE THAT RESPONDENTS LAWFULLY COULD HAVE DEMONSTRATED PROBABLE CAUSE TO BELIEVE THE CHILDREN WERE AT RISK, WHEN THEY UNDERTOOK TO REMOVE THE CHILDREN BY *EX PARTE* ACTION.

Respondents attempt to persuade this Court to deny the petition on the strength of the argument that petitioners conceded in the courts below that respondents cannot be held liable for "believing a serious child abuse situation existed [or] . . . for de-

ciding that the allegations were serious enough to warrant separation of the children from their parents." *See* Resp. Br. at 3 and 5-6.

First, petitioners do not seek to impose liability on respondents for their beliefs or their decisions. Petitioners assert that respondents are liable for *acting unfairly* in violation of petitioners' substantive and procedural rights.

Secondly, respondents' argument relies upon a distortion of the position taken by petitioners in the courts below. Respondents rest exclusively upon a quotation set forth by the district court in its first decision (App. 37) and reiterated in its second decision (App. 18). The quotation by the district court is a fragment taken from a paragraph of a thirteen page single-spaced letter brief to the district court dated February 13, 1987,[2] which was submitted shortly after the Eighth Circuit announced its decision in *Meyers v. Morris*. What was the concession? The quotation by the district court unfairly omits the footnote at the end of that paragraph in the letter brief, at 3, which states, "It should be noted that Plaintiffs do not withdraw these claims, and . . . Plaintiffs wish to preserve their claim that this aspect of the [*Meyers*] decision is in error and that their own claims remain valid and proper." Clearly, the concession that petitioners were making in the district court, for the sake of argument only, did not constitute any waiver of any claim.

Respondents attempted to raise this "concession" argument in the Eighth Circuit, but that attempt was

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[2] Exhibit C to Affidavit of Attorney David E. Lasker dated September 30, 1987 (R. Doc. CX) at 2-3.

not countenanced by the court of appeals. Respondents argued to the Eighth Circuit that petitioners "have conceded that in their case arguable probable cause existed to believe that the Doe children were being molested." Brief of Appellees at 2 and 18. Petitioners responded to that argument, saying, "the only point which the plaintiffs concede is that the *allegations* were serious." Reply Brief of Appellants at 19. "The decision that the allegations were probably true was the direct and proximate result of the defendants' own failure to do what the law required of them— not the true existence of probable cause or even the reasonable belief in the existence of probable cause under the circumstances of this case." *Id.*

Indeed, the failure of respondents to conduct a social work investigation, including contact with the parents and the children, and their deliberate indifference to the best interests of the child standard—*i.e.*, the failure of respondents to do what the Constitution (and state law) required of them (*see* Pet. at 10-16)—left respondents with nothing but allegations upon which to base the decision to act. Because of their deliberate indifference to the constitutional rights of the petitioners, respondents could not have demonstrated probable cause to believe the children were at risk. Petitioners have never conceded otherwise.

Thirdly, even if petitioners had made the concession that respondents suggest, such a concession would not be germane to the issue of liability, as respondents argue. The question of whether respondents could have demonstrated probable cause to believe the children were at risk, had due process been afforded, is

only peripherally relevant to the issue of damages. *See Carey v. Piphus*, 435 U.S. 247 (1978).

## IV. THE ALLEGATIONS BY THE ANONYMOUS CALLER ONLY RAISED THE QUESTION OF WHETHER THE CHILDREN WERE AT RISK IN THE HOME.

Respondents attempt to make it appear that they had proof that the Doe children were being sexually abused by their father, when they petitioned the juvenile court for an *ex parte* order removing the children from the home. Resp. Br. at 1-2. They present an inaccurate[3] precis of the allegations as described by the district judge at App. 30-32. *Id.* at 2. Even when read in a light most favorable to respondents' contention that they "received very specific allegations," *Id.* at 1, the fact remains that the substance and meaning of the allegations were unclear. For example, what is meant by such allegations as "one of the girls engaged in 'excessive masturbation,' " or the two-year-old "tried to undress him" and "made sexual movements"? Even the allegation that "the mother told him the father had 'smoked some horny pot' and 'came on one of the children three times' " requires an interpretation of what Mr. Yackley thought he

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[3] Counsel for respondents persist in adhering to embellishment similar to that of their clients. For example, they say that Mr. Yackley reported that the two year old "put her hands in his pants," while the fact is he said "that she had attempted to put her hands in his pants." *Compare* Resp. Br. at 2 with App. 30. Likewise, for example, they say Yackley "witnessed the use of marijuana" by the Does, while the fact is he only "asserted that the Doe parents used marijuana at home." *Compare* Resp. Br. at 2 with App. 32. The distinction between observations and assertions and between attempts and actual acts is important in evaluating the significance of uncorroborated allegations.

heard and an interpretation of what the mother was intending to tell him.

Thus, the assertion that respondents had *evidence* of abuse to the children, when they took action to remove the children from the home, is not correct. Allegations are not evidence. Undoubtedly, that is why the Minnesota statutes and regulations (like those in virtually every state) require an investigation of the facts by the social worker, including contact with the parents and the children, prior to any petition to the juvenile court. That respondents had mere allegations and not evidence is apparent from the fact that the police concluded at the end of *their* investigation[4] that they lacked evidence of any emergency. Pet. at 4.

The facts alleged by the anonymous caller only raised the question of whether the children were at risk in the home. A social work investigation, ultimately commenced on January 5, 1983 by caseworker Richard Cronk, led to the immediate conclusion that the allegations made by Yackley were without foundation. Pet. at 6; Resp. Br. at 3. Thus, the evidence in the record demonstrates only that petitioners were harmed by the wrongful actions of the respondents.

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[4] The only investigation in this case was the investigaion conducted by the police to determine whether to bring criminal charges or to exercise the emergency police power to take the children into custody. Pet. at 3-4. Respondents knew all that the police knew, and nothing more, when they acted to effect removal of the children from the home. *Id.*

## CONCLUSION

For these reasons, the relief requested in the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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